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DEL MAR SEAFOODS, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DEL MAR SEAFOODS, INC.

Plaintiff,

vs.

BARRY COHEN, CHRIS COHEN (aka
CHRISTENE COHEN), *in personam* and
F/V POINT LOMA, Official Number
515298, a 1968 steel-hulled, 126-gross ton,
70.8- foot long fishing vessel, her engines,
tackle, furniture, apparel, etc., *in rem*, and
Does 1-10,

Defendants.

And Related Counterclaims

Case No.: CV 07-02952 WHA

**PLAINTIFF'S POST-TRIAL BRIEF
RE ATTORNEYS' FEES**

Hearing Date: June 16, 2008
Time: 3:00 p.m.
Courtroom 9, 19th Floor
Hon. William H. Alsup

Plaintiff Del Mar Seafoods, Inc. hereby submits this brief addressing the issue of
attorneys' fees raised by the Court.

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1 **I. APPLICABLE LAW**

2 This case involves the foreclosure of a preferred ship mortgage and by way of an *in*
 3 *rem* action against the defendant vessel, the F/V Point Loma as provided for under The
 4 Commercial Instruments and Maritime Liens Act ("CIMLA") (previously titled "The Ship
 5 Mortgage Act") 46 U.S.C. § 31301 *et seq.*, therefore maritime law applies. 46 U.S.C. §
 6 31325. *Marastro Compania Naviera, S.A. v. Canadian Maritime Carriers, Ltd.*, 959 F.2d
 7 49, 53 (5th Cir. 1992) (maritime law controls the substantive law of maritime seizures).
 8 Defendant admits that federal maritime law applies and governs. (See, Defendant's
 9 Proposed Findings of Fact and Conclusions of Law, ¶47).

10 State laws do not apply to relative to the enforcement of a maritime contract. *Union*
 11 *Fish v. Erickson* (1919) 248 U.S. 308, 314. Applying state laws would disrupt the need for
 12 national uniformity. As the Court held:

13
 14 If one State may declare such contracts void for one reason, another may do
 15 likewise for another. Thus the local law of a State may deprive one of relief
 16 in a case brought in a court of admiralty of the United States upon a maritime
 contract, and the uniformity of rules governing such contracts may be
 destroyed by perhaps conflicting rules of the States.

17 **1. Under federal maritime law, the attorneys' fees clause in the Note must be enforced.**

18 The promissory note (T.E. 7) provides:

19 If suit is commenced on this note, maker [Cohen] shall pay to
 20 holder [Del Mar] a reasonable attorney's fee and all costs.

21 Suit was commenced in by Del Mar on the promissory note and mortgage after
 22 defendants failure to make payments required by the promissory note and mortgage.

23 Defendants have admitted that they owe a balance under the note and most of the case
 24 related not to whether they owe plaintiff, but how much they owe. The evidence presented at
 25 trial proves that the defendants were in default under the Note and Mortgage. Under the
 26 express terms of the Note (T.E. 7, pg. 2, ¶ 5) Plaintiff is entitled to recover its reasonable
 27 attorneys' fees and all costs from the Defendants. As noted above, such contractual
 28 provisions are enforceable. *Crowley American Transport, Inc. v. Richard Sewing Machine*

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1 Co., 173 F.3d 781 (11th Cir. 1999).

2 **2. Defendants Are Not Entitled To Any Recovery of Attorneys' Fees**

3 If, as Del Mar asserts, it is the prevailing party in this matter the contract provides for
4 Del Mar's right to recover its attorneys fees. Del Mar's recovery will, in the first instance,
5 preclude an award of attorneys fees to defendants.

6 Even if, however, Del Mar is not the prevailing party, defendants are still not entitled
7 to recover attorneys' fees on either the defense of plaintiff's action or on the cross-complaint
8 for wrongful arrest.

9 A. Defense of the Plaintiff's Action:

10 There is a well-established maritime law providing that contractual provisions for
11 attorneys fees are to be strictly enforced, *even if unilateral, and state statutes to the*
12 *contrary are inapplicable.*

13 Defendants have asserted two basis for recovery of attorneys' fees. First, they have
14 claimed that they should be found to be the prevailing party in the plaintiff's action, and that
15 the Court should then look to State Law and apply California Civil Code §1717 to interpret
16 the attorneys fees provision in the Promissory Note as reciprocal. This argument fails both
17 because Del Mar, not defendants, should be the prevailing party and because the federal
18 maritime law controls and precludes the application of California Civil Code §1717.

19 In *Crowley American Transport, Inc. v. Richard Sewing Machine Co.*, 173 F.3d 781,
20 785-786 (11th Cir. 1999), the appellate court, applying maritime law, held that a unilateral
21 contractual provision for attorneys' fees would be enforced. In *Golden Pisces, Inc. v.*
22 *OneBeacon America Ins. Co.*, 495 F.3d 1078 1081, 1083-1084 (9th Cir. 2007) The Ninth
23 Circuit found that no maritime rule of reciprocity of attorneys' fees exists and declined to
24 "announce a new equitable maritime exception to the [American] Rule on the basis of
25 'reciprocity'". See also, *Sosebee v. Rath*, 893 F.2d 54, 56-57 (3d Cir. 1990) (refusing to
26 apply a state statute awarding attorneys' fees in a case governed by federal maritime law);
27 *Texas A&M Research Foundation v. Versus Magna Transp., Inc.*, 338 F.3d 394, 405-406,
28 (5th Cir. 2003) (same); *Garan, Inc. v. M/V Aivik*, 907 F.Supp. 397, 400-401 (S.D.Fla. 1995)

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(same); *see also*, *Nissan Fire & Marine Ins. Co., Ltd v. BAX Global Inc.*, 2006 U.S. Dist. LEXIS 30555, 16-19 (in case governed by federal law, refusing to apply Cal. Civ. Code § 1717 to a unilateral contractual provision for attorneys' fees).

B. The Alleged Wrongful Arrest

Defendants also argue that they are entitled to an award of attorneys fees based on the wrongful arrest of the vessel. An award of attorneys' fees for bad faith "requires a high degree of specificity in the factual findings of lower courts . . . on the basis of bad faith." *Kanematsu-Gosho Ltd. v. M/T Messiniaki Aigli*, 814 F.2d 115, 119 (2d. Cir. 1987) (citation omitted). Furthermore, there must "be 'clear evidence' that the claims are 'entirely without color and made for reasons of harassment or delay or for other improper purposes.'" *Id.* (citations omitted).

Del Mar contends that the arrest was not undertaken with malice or bad faith and therefore the Court should decline to find that the arrest was "wrongful." Moreover, even if the arrest was wrongful, the Court may in its discretion decline to award attorneys fees. If the Court finds that Plaintiff wrongfully arrested the vessel, (and Plaintiff strongly contends it did not), defendants should only be entitled to attorneys' fees directly expended to release the vessel and not for the entirety of the case.

Dated: June 17, 2008

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